No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL., PETITIONERS

v.

GARY VARJABEDIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JUAN E. MONTEVERDE
MILES D. SCHREINER
MONTEVERDE & ASSOCIATES PC
The Empire State Building
350 Fifth Ave., Ste. 4405
New York, NY 10118

BENJAMIN HEIKALI
FARUQI & FARUQI LLP
10866 Wilshire Blvd., Ste. 1470
Los Angeles, CA 90024

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

QUESTION PRESENTED

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), sets out two distinct forms of liability "in connection with any tender offer." Its first clause makes it "unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." Its second clause makes it "unlawful for any person * * * to engage in any fraudulent, deceptive, or manipulative acts or practices."

Consistent with its plain text, this Court has twice construed language materially indistinguishable from the first clause to require a showing of negligence, not scienter. And this Court has also confirmed that where, as here, a statute separates two clauses with the disjunctive (declaring it "unlawful" to violate the first clause "or" the second), each clause can retain its own distinct culpability requirement.

The question presented is:

Whether an action premised solely on Section 14(e)'s first clause, not its second, requires a pleading of scienter to state a claim.

PARTIES TO THE PROCEEDING BELOW

Petitioners are Emulex Corporation; Bruce C. Edwards; Jeffrey W. Benck; Gregory S. Clark; Gary J. Daichendt; Paul F. Folino; Beatriz V. Infante; John A. Kelley; Rahul N. Merchant; Nersi Nazari; Dean A. Yoost; Avago Technologies Wireless (USA) Manufacturing, Inc.; and Emerald Merger Sub, Inc.

Respondents are Gary Varjabedian and Jerry Mutza. Mr. Varjabedian filed the initial complaint in this case, but the district court ultimately appointed Mr. Mutza as lead plaintiff for the class. See Pet. App. 1a n.1.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Introduction 1
Statement 3
Argument 7
A. The decision below does not create a square circuit conflict 7
B. The decision below is correct 14
C. The petition does not present an important question warranting further review in this case 24
Conclusion 31

TABLE OF AUTHORITIES

Cases:

Aaron v. *SEC*, 446 U.S. 680 (1980) ..... *passim*
Adams v. *Standard Knitting Mills, Inc.*, 623 F.2d 422 (6th Cir. 1980) 10, 11, 24
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 29
Chris-Craft Indus., Inc. v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973) 7
Connecticut Nat'l Bank v. *Fluor Corp.*, 808 F.2d 957 (2d Cir. 1987) 9
Continental Airlines, Inc., In re, 932 F.2d 282 (3d Cir. 1991) 20
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 29
DeKalb Cty. Pension Fund v. *Transocean Ltd.*, 817 F.3d 393 (2d Cir. 2016) 24
Digital Island Sec. Litig., In re, 357 F.3d 322 (3d Cir. 2004) 11
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) ..... *passim*

Page

Cases—continued:

Feldbaum v. *Avon Prods., Inc.*, 741 F.2d 234 (8th Cir. 1984) 13
Flaherty & Crumrine Preferred Income Fund, Inc., 565 F.3d 200 (5th Cir. 2009) 10
Garcia v. *United States*, 469 U.S. 70 (1984) 20
Gerstle v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973) 23, 24
Glover v. *United States*, 531 U.S. 198 (2001) 29
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 30
Henson v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) 14
J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 27, 29
Lane v. *United States*, 286 F.3d 723 (4th Cir. 2002) 20
Matrixx Initiatives, Inc. v. *Siracusano*, 563 U.S. 27 (2011) 27
McFarland v. *Wells Fargo Bank, N.A.*, 810 F.3d 273 (4th Cir. 2016) 19
Piper v. *Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977) 22
Pryor v. *U.S. Steel Corp.*, 591 F. Supp. 942 (S.D.N.Y. 1984) 18
Schreiber v. *Burlington N., Inc.*, 472 U.S. 1 (1985) 15, 22, 29
SEC v. *Adler*, 137 F.3d 1325 (11th Cir. 1998) 12, 13
SEC v. *Ginsburg*, 362 F.3d 1292 (11th Cir. 2004) 12, 13
SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) 23, 24
Smallwood v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974) 9, 10
Stevens v. *Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444 (6th Cir. 1992) 19
Tellabs, Inc. v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) 27

Page

Cases—continued:

TSC Indus., Inc. v. *Northway, Inc.*, 426 U.S. 438 (1976) 27
United States v. *Naftalin*, 441 U.S. 768 (1979) 19, 20
United States v. *O'Hagan*, 521 U.S. 642 (1997) 22
United States v. *Sheldon*, 755 F.3d 1047 (9th Cir. 2014) 19
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 30
Yates v. *United States*, 135 S. Ct. 1074 (2015) 20
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 29
Youakim v. *Miller*, 425 U.S. 231 (1976) 29

Statutes and regulations:

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ..... 25, 29
Securities Act of 1933,
Pub. L. No. 73-22, 48 Stat. 74 ..... *passim*
15 U.S.C. 77q(a) (§ 17(a)) 16, 18, 19
15 U.S.C. 77q(a) (§ 17(a)(1)) 12, 13
15 U.S.C. 77q(a) (§ 17(a)(2)) ..... *passim*
Securities Exchange Act of 1934,
Pub. L. No. 73-291, 48 Stat. 881 ..... *passim*
15 U.S.C. 78j(b) (§ 10(b)) ..... *passim*
15 U.S.C. 78n(a) (§ 14(a)) 10, 11, 23, 24, 29
15 U.S.C. 78n(d)(4) (§ 14(d)(4)) 21
15 U.S.C. 78n(e) (§ 14(e)) ..... *passim*
15 U.S.C. 78u-4(b)(1)(A) 25
15 U.S.C. 78u-4(b)(1)(B) 25
15 U.S.C. 78u-4(b)(2)(A) 25
Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 29
28 U.S.C. 1254(1) 1
17 C.F.R. 240.10b-5 (Rule 10b-5) ..... *passim*
17 C.F.R. 240.14a (Rule 14a-9) 11

Page

Miscellaneous:

L. Bebchuk, et al., *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 Duke L.J. 27 (Feb. 1989) 27
H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968) 22
L. Loss, et al., *Fundamentals of Securities Regulation* (5th ed. 2004) 16
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U.S. Courts, *Federal Judicial Caseload Statistics 2018* <https://tinyurl.com/2017-dct-stats> 26

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 888 F.3d 399. The order and opinion of the district court (Pet. App. 27a-57a) is reported at 152 F. Supp. 3d 1226.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2018. A petition for rehearing was denied on September 6, 2018 (Pet. App. 58a-59a). The petition for a writ of certiorari was filed on October 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

According to petitioners, the Ninth Circuit wrongly departed from multiple circuits in holding that Section

14(e) of the Securities Exchange Act of 1934 requires proof of negligence, not scienter. And according to petitioners, this "circuit split" is "as square, obvious, and consequential as they come." Pet. 15. Petitioners are wrong across the board.

First, the Ninth Circuit's decision does not implicate any direct circuit conflict. Petitioners cannot identify a single appellate decision that squarely rejects the Ninth Circuit's logic, much less in the relevant context (construing Section 14(e)'s *first* clause, not its second) and after this Court's intervening guidance. Once the circuit decisions are reviewed in their proper context (which petitioners brush aside), the circuit conflict is illusory.

Second, the Ninth Circuit correctly read Section 14(e)'s plain language to mean what it says. Its two clauses are set up as separate, independent bans on distinct wrongdoing. The first clause—prohibiting material misstatements and omissions—has nothing to do with scienter. Indeed, a scienter requirement does not expressly appear *anywhere* in Section 14(e), and only its second clause even uses words traditionally associated with scienter ("fraudulent, deceptive, and manipulative"). This Court has *twice* construed materially identical text as requiring mere negligence, not scienter. There is no reason to give the same language a different meaning here.

Third, this case lacks any broader significance warranting review. Petitioners predict a rash of reckless securities litigation, but their concerns are unfounded. Securities claims are difficult to prove. There are few cases that can satisfy every other heightened element, but would still lose on scienter alone. This issue is unlikely to matter in any meaningful number of cases, which is likely why few appellate courts have squarely addressed the question.

Finally, petitioners suggest in passing that the Court should grant review to decide whether Section 14(e) authorizes a private right of action. That question was not pressed or passed upon below; quite the contrary, petitioners expressly *conceded* that Section 14(e) *does* support a private right of action. In any event, that question is insubstantial on the merits. Every single circuit to have confronted the question has reaffirmed that Section 14(e) is privately enforceable; this Court has implicitly done the same; and Congress has twice enacted major overhauls of the securities laws without disturbing this clear and unbroken line of authority. Congress enacted Section 14(e) against the backdrop of directly analogous implied actions *in this very context*; when Congress invoked the same textual formulation, it quite clearly intended the same result. If the Court nonetheless thinks the issue has any possible merit, it should at least await a vehicle where the petitioners did not outright waive the question below.

The Ninth Circuit faithfully read Section 14(e)'s plain text consistent with this Court's unmistakable guidance, and its decision does not directly conflict with the actual holding of any court of appeals. The petition for a writ of certiorari should be denied.

STATEMENT

1. This action arises from a merger between Emulex Corporation and Avago Technologies. The companies announced their merger agreement in February 2015, with "Avago offering to pay $8.00 for every share of outstanding Emulex stock." Pet. App. 2a-3a. That price reflected a 26.4% premium over the previous closing price, and a 4.8% premium over Emulex's 52-week high. C.A. E.R. 96-97; see also Pet. App. 39a.

Emulex hired Goldman Sachs to perform a fairness analysis on the proposed deal. As part of its work, Goldman Sachs conducted a premium analysis—a study of 17 comparable transactions that Goldman Sachs "deemed most similar to the proposed merger." Pet. App. 4a-5a. That analysis revealed Emulex's premium was decidedly below average: other companies received mean and medium premiums of (i) 44.8% and 50.8% over their undisturbed stock price, and (ii) 17.6% and 14.4% over their 52-week highs. C.A. E.R. 261. Those figures represented *multiples* of the premium offered to Emulex's shareholders. Goldman Sachs nonetheless concluded the merger was fair "despite a below-average premium." Pet. App. 5a.

Emulex filed a 48-page Recommendation Statement with the SEC supporting Avago's offer and encouraging shareholders to tender their shares. Pet. App. 3a-4a; C.A. E.R. 45. It listed nine reasons for that recommendation, including (repeatedly) that "Emulex shareholders would receive a premium on their stock." Pet. App. 4a. Despite devoting five single-spaced pages to summarizing Goldman Sachs's fairness opinion, Emulex neglected to disclose the premium analysis (or its showing of a below-average premium) at any point in its extended filing. *Id.* at 5a, 30a.

The merger was ultimately consummated, but the approval was close: only 60.58% of outstanding shares were tendered. C.A. E.R. 194.

2. In response to these events, a shareholder class filed suit against Emulex, its board, and Avago for violating federal securities laws. Pet. App. 5a-6a. As relevant here, the class sought relief under Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), which was added as part of the Williams Act of 1968, Pub. L. No. 90-439, 92 Stat. 454.

Section 14(e) sets out two distinct types of liability in the tender context. Its first clause prohibits "any untrue statement of a material fact or [a material] omi[ssion]," and its second clause prohibits "any fraudulent, deceptive, or manipulative acts or practices." 15 U.S.C. 78n(e). The class alleged a violation of the first clause: petitioners made material misstatements and omissions by touting the premium while failing to "disclose[]" it "was below average." Pet. App. 5a.

3. The district court dismissed the complaint. Pet. App. 27a-57a. It held that scienter was required to prove a Section 14(e) violation, and it found the class failed to adequately allege scienter. *Id.* at 33a-51a. In the course of its analysis, the court acknowledged respondents' position that scienter was not required, and recognized that scholars and treatises read Section 14(e)'s first clause as imposing only a negligence standard. *Id.* at 35a-36a. While the court admitted respondents' position was "not entirely without merit," it decided the "better view" was to follow "the wealth of persuasive case law to the contrary." *Id.* at 36a.[1]

4. a. The court of appeals reversed. Pet. App. 1a-26a. As relevant here, the court held that claims premised on Section 14(e)'s first clause "require[] a showing of negligence, not scienter." *Id.* at 2a. Because respondents' claims were premised solely on that first clause, the court found the district court erred by requiring a showing of intentional misconduct. *Id.* at 20a.

The Ninth Circuit started its analysis with the text. Pet. App. 8a. It noted that a "plain reading" of Section

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[1] Because the district court dismissed the complaint on culpability grounds, it declined to decide whether respondents had adequately pleaded materiality. See Pet. App. 34a n.3.

14(e) "divides the section into two clauses, each proscribing different conduct." *Ibid.* It found that the "text of the first clause" is "devoid of any suggestion that scienter is required." *Id.* at 16a. It explained that this Court had construed "largely identical" text to "require[] a showing of negligence, not scienter." *Id.* at 13a (discussing *Aaron* v. *SEC*, 446 U.S. 680 (1980), and *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)). And the court reinforced its conclusion with Section 14(e)'s "legislative history and purpose"—which "place[] more emphasis on the quality of information shareholders receive in a tender offer than on the [issuer's] state of mind." *Id.* at 15a-16a.

While recognizing that other courts had suggested scienter is required, the Ninth Circuit exhaustively refuted their logic, especially their presumption that the same rules apply to both Rule 10b-5 (which requires scienter) and Section 14(e)'s first clause (which does not). Pet. App. 9a-16a. As the Ninth Circuit explained, those courts overlooked "important distinctions" between the two provisions, and likewise ignored (or preceded) this Court's pertinent authority. *Id.* at 9a, 14a-15a. The court explained, for example, that *Ernst*'s conclusion to require scienter under Rule 10b-5 "had nothing to do with [its] text," but instead resulted from the Rule's "relationship" with "its authorizing legislation, Section 10(b)," which textually *did* require scienter. *Id.* at 11a-12a (further noting that "[t]his rationale regarding Rule 10b-5 does not apply to Section 14(e), which is a statute, not an SEC Rule"). And it explained that other decisions preceded *Aaron*, which construed Section 17(a)(2)'s parallel language to "*not* require a showing of scienter"—thus "cast[ing] doubt" on earlier Section 14(e) decisions from multiple circuits. *Id.* at 12a.

b. Judge Christen concurred in "full[]." Pet. App. 20a. She emphasized that the panel's decision "is a faithful application" of this Court's decisions, unlike other courts

that failed to "address[] the ramifications of the Supreme Court's holdings." *Id.* at 20a-26a. Under the Act's plain text, she explained, "[o]nly the second clause of § 14(e) contemplates a scienter requirement; Congress did not use the words signaling a heightened standard of culpability in the first clause of the statute." *Id.* at 24a.

Judge Christen concluded that one "cannot be sure how other circuits would rule were they to revisit § 14(e) in light of *Ernst & Ernst* and *Aaron*." Pet. App. 26a.

5. The court of appeals subsequently denied a petition for rehearing without recorded dissent. Pet. App. 58a-59a.

ARGUMENT

A. The Decision Below Does Not Create A Square Circuit Conflict

Contrary to petitioners' contention, the Ninth Circuit did not create a genuine circuit conflict. Petitioners cannot identify a single circuit actually deciding the issue after analyzing Section 14(e)'s *first* clause, especially in a case post-dating this Court's authoritative decisions. None of the cases grapple with the Ninth Circuit's rationale. Those cases rest on scant reasoning (or worse); some address the question in dicta (and thus *held* nothing); and at least one "decided" the issue when it was *uncontested* by both sides, leaving nothing *to decide*. Aside from a few errant statements and some superficial disagreement, there is no legitimate split. Further review is unwarranted.

1. a. Petitioners argue that the Ninth Circuit's holding conflicts with an "unbroken line of decisions," starting with the Second Circuit's decision in *Chris-Craft Indus., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973). See Pet. 12. But *Chris-Craft* was decided before this Court's intervening decisions in *Ernst* and *Aaron*, which undeniably altered the landscape. And the overriding effects of this Court's precedents are obvious. According to

Chris-Craft, because the text of Section 14(e) is "virtually identical" to the text of Rule 10b-5, the two provisions should have the same elements. 480 F.2d at 362. But *Ernst* later explained that Rule 10b-5 was narrowed due to the limiting language in Section 10(b), which does *not* limit Section 14(e). And *Aaron* construed language indistinguishable from Section 14(e)'s first clause to require negligence, not scienter. *Chris-Craft* did not break down and examine Section 14(e)'s text (see 480 F.2d at 362-363), and it assumed a direct connection between Rule 10b-5 and Section 14(e) that (under *Ernst* and *Aaron*) does not exist. The Second Circuit had no occasion to consider the relevant question in light of this Court's subsequent authority.

Moreover, petitioners overlook the Second Circuit's actual holding. While the court said that "mere negligence" was not enough, it continued to adopt a pseudo-*negligence* standard: "In sum, and put as simply as possible, the standard for determining liability under § 14(e) * * * is whether plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts *when they were available to him or could have been discovered by him with reasonable effort*." 480 F.2d at 364 (emphasis added). The latter phrase closely approximates today's version of negligence, further eliminating any practical daylight between *Chris-Craft* and the decision below. In any event, the Second Circuit ultimately held that "each of the defendants violated § 14(e)," so there was culpability *under either standard*. *Id.* at 362. The question presented here was thus irrelevant to the outcome. If this is a conflict at all, it is exceptionally weak.

To overcome these problems, petitioners say the Second Circuit has "adhered" to a scienter requirement "ever since," but they cite only a single case for support. Pet. 12

(invoking *Connecticut Nat'l Bank* v. *Fluor Corp.*, 808 F.2d 957 (2d Cir. 1987)). While *Fluor* at least came after this Court's relevant decisions, it neither discussed nor analyzed *Ernst* or *Aaron*. It merely declared the issue "settled" without explanation, let alone any attempt to square *Chris-Craft*'s (discredited) rationale with this Court's authority. It is hard to understand *Flour* as reconciling *Chris-Craft* with two Supreme Court cases it failed to cite. And *Fluor*'s scant review was unsurprising: the plaintiff's claims there—focusing on type size and paragraph placement—arguably implicated Section 14(e)'s *second* clause, not its first, presenting a different legal question. 808 F.2d at 960-961. There is no live conflict with the Second Circuit.

b. Nor is there any genuine conflict with the Fifth Circuit. Contra Pet. 12-13. First, *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974), also arose before *Ernst* and *Aaron*, rendering any theoretical conflict stale. And it is especially stale given *Smallwood*'s narrow reasoning: according to the Fifth Circuit, because Congress modeled Section 14(e) after "the second paragraph of Rule 10b-5," then Congress also "accepted the precedential baggage" of those words. *Id.* at 605. Yet the "words" of Rule 10b-5 were modeled after the words of Section 17(a)(2), *which* Aaron *later construed to require negligence, not scienter*. See *Aaron*, 446 U.S. at 696-697 (construing 15 U.S.C. 77q(a)(2)'s prohibition on "untrue statement[s]" of material fact or material "omis[issions]"); *Ernst*, 425 U.S. at 213 n.32 (explaining Rule 10b-5's "deriv[ation]" from Section 17). The Fifth Circuit would have been aware of this important development had it decided the issue after *Aaron*. As it stands today, however,

the "precedential baggage" of the relevant language flips the Fifth Circuit's conclusion on its head.[2]

Petitioners again respond (Pet. 13) that the Fifth Circuit "adhered" to a scienter requirement in *Flaherty & Crumrine Preferred Income Fund, Inc.*, 565 F.3d 200 (5th Cir. 2009). But *Flaherty*'s limited discussion was dicta. It found no actionable "misstatement" because the challenged disclosures were *"accurate[]"—i.e.*, the disclosures were not "insufficient, let alone fraudulent." 565 F.3d at 210-211 (emphasis added). That predicate finding was outcome-determinative. Scienter was discussed only hypothetically—*"[e]ven assuming"* any statement was "misleading." *Id.* at 211 (emphasis added). In understandably cursory treatment, *Flaherty* declared Section 14(e)'s elements "identical to the Section 10(b)/Rule 10b-5 elements" (*id.* at 207 (citing *Smallwood*)), but never asked whether *Smallwood* survived *Ernst* or *Aaron*, which it never mentioned. The question presented thus has not been definitively resolved in the Fifth Circuit.

c. Petitioners next count *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422 (6th Cir. 1980), as part of the split. Pet. 13. This is more than a reach. *Adams* was not even a Section 14(e) case; it resolved different claims (*e.g.*, under "[Sections] 10(b) and 14(a)"), and thus *held* nothing under Section 14(e). 623 F.2d at 423-424. The Sixth Circuit discussed Section 14(e) merely as "another * * * consider-

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[2] While *Smallwood* declared "mere negligence" insufficient, it emphasized "[t]he trend" in federal courts "toward a more relaxed [scienter] test," again suggesting a standard resembling negligence. 489 F.2d at 606.

ation" for its *actual* holding under the Act's other provisions. *Id.* at 430 (looking to Congress's intent behind "subsequent amendments that are indirectly linked to 14(a)").[3]

Even *Adams*'s sparse analysis fails to help petitioners. The Sixth Circuit suggested that "scienter" was required under Section 14(e) because it "use[s] the words 'fraudulent,' 'deceptive,' and 'manipulative.'" 623 F.2d at 431. But those words appear exclusively in Section 14(e)'s *second* clause, which is irrelevant here. *Adams* ignored the first clause's distinct language, and never considered that each clause could have different elements, including distinct "culpability requirement[s]." *Aaron*, 446 U.S. at 697. And since *Adams* was issued *before Aaron* by a month, it did not grapple with *Aaron*'s discussion of Section 17(a)(2), which mirrors Section 14(e)'s *relevant* language. See *id.* at 695-697. In short, if *Adams* believed that scienter applies whenever Congress "uses" language like Section 14(e)'s *second* clause (per *Ernst*), it presumably would also find negligence applies whenever Congress "uses" language like Section 14(e)'s *first* clause (per *Aaron*). That question, again, remains open in the Sixth Circuit.[4]

d. Petitioners' reliance on *In re Digital Island Sec. Litig.*, 357 F.3d 322 (3d Cir. 2004), is likewise flawed. See Pet. 13-14. The issue there was *conceded*: "both parties"

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[3] *Adams*'s holding under those other provisions was not even unanimous. 623 F.2d at 447 (Weick, J., dissenting on denial of reh'g) ("unlike Section 10(b)," "neither Section 14(a) nor Rule 14a-9 uses language which would even suggest a [scienter] requirement").

[4] Indeed, it is far from obvious that the Sixth Circuit even intended its commentary to apply to Section 14(e)'s first clause: it grounded its views directly in the presumption that "Congress intends scienter when it uses the above quoted language"—*i.e.*, "the words 'fraudulent,' 'deceptive,' and 'manipulative.'" 623 F.2d at 431. The Sixth Circuit did not say what standard is appropriate when Congress uses the *different* "language" in Section 14(e)'s first clause (*i.e.*, the making of "any untrue statement of a material fact" or material "omi[ssion]").

"agree[d]" that "Section 14(e) requires proof of scienter" (357 F.3d at 328 & n.9), so there was nothing for the court to decide. It is hardly obvious that *Digital*'s single paragraph on an undisputed issue stands as binding precedent in the Third Circuit.

In any event, likely because the issue was uncontested, *Digital*'s commentary was brief. 357 F.3d at 328. It said that because Section 14(e) was "'modeled'" on Section 10(b) and Rule 10b-5, it must likewise require "proof of scienter." *Ibid.* But the court drew that rough comparison without analyzing Section 14(e)'s actual text, acknowledging its two independent clauses, explaining why those distinct clauses have the same elements, or reconciling its views with *Aaron* (which the Third Circuit never cited or discussed). Moreover, the complaint was dismissed on alternative grounds, and the Third Circuit declared the plaintiffs' theory "a weak inference teetering on an unfounded assumption." *Id.* at 327, 330. It is a stretch to label *Digital*—a thin analysis of an uncontested issue in a poor vehicle—as a genuine conflict.

e. As their final shot, petitioners argue that *SEC* v. *Ginsburg*, 362 F.3d 1292 (11th Cir. 2004), also rejected the Ninth Circuit's position. Pet. 14. But *Ginsburg* did not even present the same issue: it confronted *insider-trading* allegations, which fall under Section 14(e)'s *second* clause, not its first. See 362 F.3d at 1295. *Ginsburg* treated claims identically under "§ 10(b) and § 14(e)" despite their obvious textual differences, and found that both require "scienter" without explanation. *Id.* at 1297. Indeed, *Ginsburg*'s sole "support" consisted of a bald citation to *SEC* v. *Adler*, 137 F.3d 1325 (11th Cir. 1998), which addressed claims "under § 10(b), Rule 10b-5, and § 17(a)(1)," *not* Section 14(e). 137 F.3d at 1340.

And it goes downhill from there: *Adler* tellingly limited its "scienter" discussion to Section "17(a)(1)," not Section 17(a)(2). See 137 F.3d at 1340. The former approximates claims under Section 14(e)'s *second* clause, requiring scienter; the latter approximates claims under Section 14(e)'s *first* clause, requiring negligence. *Aaron*, 446 U.S. at 695-697. If anything, this indicates that the Eleventh Circuit, like the Ninth Circuit, would have drawn the correct line were this question factually presented.

In any event, *Ginsburg*'s (sparse) discussion was irrelevant to the outcome because scienter was *satisfied*. See 362 F.3d at 1296. *Ginsburg* thus addressed the wrong clause, was unreasoned, and would have reached the same result under a negligence standard. That is thin gruel for a circuit conflict.[5]

2. Petitioners' claim of a "square, obvious, and consequential" circuit conflict (Pet. 15) is thus deeply overblown. But to the extent some disagreement exists, this is a clear-cut case for further percolation. No other court of appeals has grappled with the Ninth Circuit's analysis. As explained above, other circuits have overlooked Section

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[5] Unlike petitioners, the U.S. Chamber of Commerce argues that Eighth Circuit law is also "in conflict" with the decision below. U.S. Chamber Amicus Br. 4 (citing *Feldbaum* v. *Avon Prods., Inc.*, 741 F.2d 234, 237 (8th Cir. 1984)). There is a reason that not even petitioners included this case among the purported split. *Feldbaum* had nothing to do with culpability requirements. The word "scienter" does not appear anywhere in the opinion, and the court's limited discussion focused on whether there was *a material misstatement* or *manipulative device*. See 741 F.2d at 236-237 ("we hold the District Court was correct in its dismissal of plaintiff's claim that defendants failed to disclose material facts"; "[w]e also agree with the District Court's conclusion that the option granted to AVP is not a manipulative device"). While most of petitioners' authority focused on the wrong clause in Section 14(e), the Chamber's case does not even focus on the right question.

14(e)'s operative text, flouted *Aaron*'s construction of indistinguishable language, and embraced *Ernst*'s holding while ignoring its controlling rationale—which expressly cabins *Ernst* to Section 10(b)'s unique context. If petitioners are truly right that all of these factors are irrelevant, then the Court can take up the issue after at least *one* court of appeals confirms its prior position. But review at this point is decidedly premature.

The Ninth Circuit's analysis is the most robust of any case resolving this issue, counterbalancing the simple head-counting on the other side. Given that no other circuit has squarely addressed this question in an appropriate case, there is every reason to offer them a chance to sharpen the issues and reach the correct disposition. As of now, however, petitioners have failed to identify a genuine conflict warranting the Court's immediate intervention.

B. The Decision Below Is Correct

Review is also unwarranted because the Ninth Circuit's decision is correct. Petitioners' contrary view (Pet. 15-22) is incompatible with Section 14(e)'s plain text, statutory purpose, and legislative history, and their reading is irreconcilable with this Court's interpretation of indistinguishable language in related securities provisions. Petitioners' argument is meritless and should be rejected.

1. a. Statutory interpretation starts with the text (*e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017)), and the text here is unambiguous. Section 14(e) is plainly divided into two clauses, each targeting a different category of prohibited conduct:

> It shall be unlawful for any person [1] to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or [2] to engage

> in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer * * * .

15 U.S.C. 77n(e) (brackets added).

The first clause has no hint of scienter. It does not expressly require scienter (or *any* specific state of mind). It does not use any of the usual terms associated with scienter (*Aaron*, 446 U.S. at 695-696), even though the *second* clause does (*Ernst*, 425 U.S. at 199). Its terms are satisfied whenever a covered defendant makes a material misstatement or omission, irrespective of the actor's intent. And it does so in the context of a statute mandating *disclosure* so shareholders can make informed decisions. *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1, 8-10 (1985). A *negligent* misstatement or omission is still a misstatement or omission, and it still deprives shareholders of necessary information. If Congress wanted to restrict Section 14(e)'s reach to intentional wrongdoing, it assuredly knew how to do it.

b. This Court has already twice construed indistinguishable language as requiring negligence, not scienter. First, the Court in *Aaron* so held for Section 17(a)(2), which prohibits "obtain[ing] money or property by means of any untrue statement of a material fact or any [material] omission." 15 U.S.C. 77q(a)(2); compare 15 U.S.C. 78n(e) (using indistinguishable terms). As *Aaron* explained, that language is "devoid of any suggestion whatsoever of a scienter requirement." 446 U.S. at 696. It quoted a "well-known commentator" as noting "'[t]here is nothing on the face of [Section 17(a)(2)] itself which smacks of *scienter* or intent to defraud." *Ibid.* (quoting 3 L. Loss, *Securities Regulation* 1442 (2d ed. 1961)).[6] While

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[6] That same "well-known commentator" examined Section 14(e)'s text and concluded its first clause likewise requires negligence, not

other parts of Section 17(a) might require scienter, this Court found that Section 17(a)(2)'s language "compel[s] the conclusion" that "scienter" is not "required." *Id.* at 697.

Petitioners have no real answer for the obvious parallel between Sections 14(e) and 17(a)(2). *Aaron* read materially indistinguishable language to "mean what it so plainly seems to say"—that scienter was *not* required. 446 U.S. at 697. There is simply no basis for assigning the same words a different meaning here.[7]

Second, this Court in *Ernst* read the same language the same way, finding that Rule 10b-5(b)'s parallel text "could encompass both intentional and negligent behavior." 425 U.S. at 212-213 (Rule 10b-5(b)'s language, "[v]iewed in isolation," proscribes "any type of material misstatement or omission," "whether the wrongdoing was intentional or not"); accord *Aaron*, 446 U.S. at 696 (reaffirming this point). While *Ernst* ultimately adopted a different reading, it did so for *independent* reasons, none of

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scienter. L. Loss, et al., *Fundamentals of Securities Regulation* 652 (5th ed. 2004) (reproduced at C.A. E.R. 190).

[7] Petitioners argue *Aaron* is distinguishable because (i) Section 17(a) is not privately enforceable, and (ii) *Aaron* involved claims for injunctive relief. Pet. 21-22. As for the first: the relevant question is not *who* enforces these sections, but *what these sections mean*; the "identity of the plaintiff" is irrelevant. *Aaron*, 446 U.S. at 691 (so holding). As for the second: the right inquiry is not what relief is available once culpability is established, but *the standard for establishing culpability*. *Ibid.* (rejecting the proposition that the standard turns on "the identity of the plaintiff or *the nature of the relief sought*") (emphasis added). *Aaron* examined the plain text and determined intent was not required to prove a violation. The language in each section (Sections 14(e) and 17(a)(2)) is indistinguishable, and *Aaron* construed that language on its face to require only negligence, not scienter.

which apply here. See *Ernst*, 425 U.S. at 212-213 (explaining that, under its natural reading, Rule 10b-5 would "exceed" the SEC's rulemaking authority, given Section 10(b)'s narrow focus on "intentional wrongdoing").

In response, petitioners argue that, whatever its reasoning, *Ernst* still "held" that scienter was required, and Section 14(e) tracks Section 10(b) and Rule 10b-5. Pet. 15-16. This is perplexing. *Ernst*'s disposition turned on the limited scope of Section 10(b), not the broader language in Rule 10b-5. See *Aaron*, 446 U.S. at 690 (so noting). As *Ernst* explained, Section 10(b), unlike Section 14(e), focused *exclusively* on concepts invoking scienter ("manipulation," "deception," etc.). 425 U.S. at 197-199. Because Section 10(b) required scienter, Rule 10b-5 also had to require scienter; otherwise, the SEC's rule would "exceed" the scope of its rulemaking authority. *Id.* at 212-213.[8]

Those points have nothing to do with Section 14(e). Its two clauses are each found in a *statute*, not a regulation. There is no concern of the SEC exceeding its authority, because the question is what *Congress* itself wrote into the statute. And while Section 14(e)'s second clause mirrors Section 10(b)'s language, its first clause has no counterpart in Section 10(b). That first clause sweeps beyond Section 10(b)'s narrow focus, and its terms are "devoid of any suggestion whatsoever of a scienter requirement." *Aaron*, 446 U.S. at 696. For exactly those reasons, this Court

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[8] Contrary to petitioners' contention, *Ernst*'s "central teaching" thus was not its brief reference to "'procedural restrictions'" (Pet. 21); the Court was clear that Section 10(b)'s language drove the analysis. *Ernst*, 425 U.S. at 200-201 (focusing "primarily on the language of that section"); see also *Aaron*, 446 U.S. at 690 (*Ernst*'s "most important" consideration "was the plain meaning of the language of § 10(b)"). Petitioners are wrong to minimize the Court's paramount focus on the language itself.

readily concluded that Section 17(a)(2) required negligence, not scienter, despite its parallels to Section 10(b) and Rule 10b-5. The same logic inescapably applies here. See also, *e.g.*, *Pryor* v. *U.S. Steel Corp.*, 591 F. Supp. 942, 955 n.19 (S.D.N.Y. 1984).

Petitioners retort that Congress modeled Section 14(e)'s language on the text of Rule 10b-5, so the two must have the same meaning. Pet. 16, 21. But this ignores that Rule 10b-5(b) itself was based on the text of Section 17(a)(2) (see *Ernst*, 425 U.S. at 213 n.32), which, again, this Court *construed to require negligence, not scienter* (see *Aaron*, 446 U.S. at 695-697). Had the Rule not been constrained by the *narrower* text of Section 10(b), the Court presumably would have adopted Rule 10b-5's natural reading, consistent with its origins in Section 17. To the extent the historical source dictates the text's meaning, this only reaffirms the Ninth Circuit's construction.[9]

2. Petitioners' efforts to avoid the plain text fall short.

a. Petitioners insist that Section 14(e)'s separate clauses must be read together to impose a unitary scienter requirement. Pet. 17-18. But this Court already rejected that proposition in *Aaron*, holding that no "uniform" treatment was required. 446 U.S. at 697. It explained that provisions like this are properly read as targeting separate categories, each with their own independent requirements. *Ibid.* ("each subparagraph of § 17(a) 'proscribes a distinct category of misconduct'"). This is confirmed by "the use of an infinitive to introduce each of [the] subsections, and the use of the conjunction 'or' at the end of the

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[9] Petitioners thus miss the irony in arguing that "the Ninth Circuit overlooked that, unlike Section 14(e), Section 17 of the 1933 Act was not 'modeled on the antifraud provisions of § 10(b) of the [1933] Act and Rule 10b-5.'" Pet. 21. On the contrary, Rule 10b-5 *was modeled after Section 17*. *Ernst*, 425 U.S. at 213 n.32. Petitioners thus have the history exactly backwards.

first two." *United States* v. *Naftalin*, 441 U.S. 768, 774 (1979). Had Congress wanted identical coverage under each clause, it would have used the same wording in each section. *Id.* at 773-774. Instead, Congress outlined "distinct categor[ies] of misconduct" because "[e]ach succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *Id.* at 774; accord *Aaron*, 446 U.S. at 697.[10]

That reasoning controls here. As with Section 17(a), Section 14(e)'s clauses are phrased in the disjunctive, and each clause is "introduce[d]" with "an infinitive." *Naftalin*, 441 U.S. at 774. Congress enumerated two prohibitions to establish liability if one "*or*" the other is met; it did not separate out independent commands (each with its own infinitive) only to collapse the two together. See, *e.g.*, *McFarland* v. *Wells Fargo Bank, N.A.*, 810 F.3d 273, 285 (4th Cir. 2016); *United States* v. *Sheldon*, 755 F.3d 1047, 1050 (9th Cir. 2014); *Stevens* v. *Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 452 (6th Cir. 1992).

Moreover, petitioners' reading invites an obvious surplusage problem: if each clause requires scienter, then these two separate provisions, drafted in conspicuously different terms, would cover the same conduct. An *intentional* "untrue statement" surely qualifies as a "fraudulent, deceptive, or manipulative act[] or practice[]" (15 U.S.C. 78n(e)), leaving nothing for Section 14(e)'s first

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[10] Although Section 17(a) is broken into formal subsections, the Court looked primarily at "the words themselves," not "the use of separate numbers to introduce each subsection." *Naftalin*, 441 U.S. at 774 n.5. The section's "'punctuation'" was addressed only in a single footnote as mere "confirmation" for the language appearing "'on the face of the statute.'" *Ibid.* At bottom, the operative language in each provision is still found in a *single sentence*.

clause to do. These clauses use different language to invoke different prohibitions, and the Ninth Circuit's construction gives independent meaning to "'each distinct category of misconduct.'" *Aaron*, 446 U.S. at 697. Petitioners' theory, by contrast, reads the first clause straight out of the statute. See *Lane* v. *United States*, 286 F.3d 723, 730-731 (4th Cir. 2002).

b. Nor does noscitur a sociis require a different outcome. Pet. 17. That canon cannot override each clause's unambiguous language, and petitioners cannot explain why the second clause (with its distinct prohibition) should artificially limit the first clause's natural scope. *In re Continental Airlines, Inc.*, 932 F.2d 282, 288 (3d Cir. 1991). Petitioners might have a point if Congress had prohibited [1] "mak[ing] any untrue statement" or [2] "engag[ing] in any *other* fraudulent, deceptive, or manipulative" act. But "Congress did not write the statute that way." *Naftalin*, 441 U.S. at 773. Congress isolated the terms invoking scienter to a distinct clause, and clearly delineated the section's *two* prohibitions by phrasing them in the disjunctive, introducing each with the infinitive "to." "When Congress has separated terms with the conjunction 'or,' it is presumed that Congress intended to give the terms 'their separate, normal meanings.'" *Ibid.* (quoting *Garcia* v. *United States*, 469 U.S. 70, 73 (1984)).[11]

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[11] A better use of noscitur a sociis here is construing the three words in the *second* clause by "the company [they] keep[]" (*Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015))—which is why it makes sense to require scienter for "manipulative" or "deceptive" acts. But it makes no more sense to impose a scienter requirement for the first clause than it would to *eliminate* one for the second—even though the first clause is naturally read to capture only *negligence* and in fact *precedes* the second part of the sentence.

In sum, just as there was no reason in *Aaron* to distort Section 17(a)(2)'s natural meaning due to its "neighbor[ing]" clauses (Pet. 17), there is no reason to distort Section 14(e)'s first clause here. Petitioners have no legal or logical basis for reading this distinct language to impose a uniform culpability requirement. See, *e.g.*, *Aaron*, 446 U.S. at 697 (rejecting an analogous proposition).

c. Petitioners also focus on Section 14(e)'s limited rulemaking delegation (Pet. 18), but this proves *respondents'* point. That delegation authorizes the SEC to regulate actions falling within Section 14(e)'s *second* clause, but not its first. 15 U.S.C. 78n(e) (limiting the SEC's focus to "acts and practices" that "are fraudulent, deceptive, or manipulative"). If Congress felt both clauses covered the same ground, it would have authorized rulemaking under the entire subsection. The limited delegation reaffirms that Congress saw an obvious difference between the two provisions, each warranting its own separate treatment.

Petitioners ask why Congress would authorize the SEC to combat only "[]fraud" if Section 14(e)'s first clause covers negligence. The answer is obvious: The second clause requires more guidance. The first clause covers misstatements and omissions, which are known quantities with established meanings. They require little elaboration.[12] That is not true of the second category, which covers *any* unspecified "act[]" or "practice[]" that is "fraudulent, deceptive, or manipulative." That undefined conduct begs for rules clarifying stakeholders' rights and obligations. Congress's targeted delegation says nothing about the standards to prove a violation under the first clause.

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[12] Anyhow, the SEC had *preexisting* authority under Section 14(d) to regulate mandatory disclosures for tender offers, including any misstatements or omissions. 15 U.S.C. 78n(d)(4).

d. Petitioners argue that the outcome in *Ernst* turned not on the text, but Section 10(b)'s absence of "'significant procedural restrictions'"—and Congress would not authorize an action for "mere negligence" without imposing the same safeguards found in its "express causes of action[]." Pet. 16, 21 (citing *Ernst*, 425 U.S. at 208-209). Petitioners have misread *Ernst*: the Court's concern was not the absence of procedural restrictions per se, but the reality that extending the "remedy under § 10(b)" would "nullify" the *express* actions under other sections (by covering the same ground). *Ernst*, 425 U.S. at 209 (discussing Section 10(b)'s substantive overlap with "causes of action covered by §§ 11, 12(2), and 15"). There is no such concern with Section 14(e)'s targeted prohibitions in the tender context.[13]

In short, contrary to petitioners' contention, the Court's single paragraph on this point does not stand for the sweeping proposition that negligence standards are always verboten in implied rights of action.

3. Petitioners' theory would also undermine Congress's objectives. Section 14(e) was "devoted to disclosure." *Schreiber*, 472 U.S. at 11-12. It affirmed the offeror's obligation "to make full disclosure of material information" (H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968)), arming shareholders with the facts necessary to make intelligent decisions. *United States* v. *O'Hagan*, 521 U.S. 642, 667-668 (1997); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 30-31 (1977).

That purpose is frustrated when corporate actors fail to furnish material information, intentionally or otherwise. A negligence standard "serve[s] to reinforce the high duty of care owed by a controlling corporation" to its

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[13] Besides, the culpability standard is a *substantive* element; scienter is not a "procedural" restriction. Contra Pet. 18.

shareholders (*Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1300 (2d Cir. 1973)), especially when making critical decisions. Congress expected corporate statements to be correct—which is why it declared it "unlawful" to "make *any* untrue statement" or "omi[ssion]." 15 U.S.C. 78n(e) (emphasis added). Requiring scienter undercuts Congress's disclosure mandate.

Section 14(e)'s context also differs from other areas where scienter makes sense. Rule 10b-5 cases, for example, often target speakers under no "obligation" to say anything. *Gerstle*, 478 F.2d at 1300. An innocent mistake on a non-mandatory topic requires heightened protection, which preserves the incentive for speakers to voluntarily disclose information. *Ibid.*; see also, *e.g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-867 (2d Cir. 1968) (Friendly, J., concurring) ("If the only choices open to a corporation are either to remain silent and let false rumors do their work, or to make a communication, *not legally required*, at the risk that a slip of the pen or failure properly to amass or weigh the facts * * * will lead to large judgments," "most corporations would opt for the former") (emphasis added).

Those concerns have little place in the context of compulsory disclosures. Sections 14(a) and 14(e) govern compulsory statements required by law before corporate mergers can be submitted for shareholder approval. In that different context, speakers are required to provide necessary information so shareholders can make informed decisions. While the decision to voluntarily speak on other topics is sensibly left to a higher bar, Section 14(e)'s plain

text reflects Congress's intent to subject these disclosures to more stringent review.[14]

Finally, a scienter requirement is incompatible with Section 14's broader scheme. Congress enacted Section 14(e) to impose the same rules in the tender context that Section 14(a) already imposed in the proxy context. See, *e.g.*, *Adams*, 623 F.2d at 430 (Congress intended uniform "standards of liability" for Sections 14(a) and 14(e)). And courts have overwhelmingly recognized that negligence is sufficient to state a claim under Section 14(a). *DeKalb Cty. Pension Fund* v. *Transocean Ltd.*, 817 F.3d 393, 409 & n.95 (2d Cir. 2016). There is no obvious reason for adopting a different liability standard under Section 14(e).

C. The Petition Does Not Present An Important Question Warranting Further Review In This Case

All else aside, the question presented lacks sufficient importance to warrant further review. A negligence standard is unlikely to determine the outcome in all but a tiny percentage of securities cases, and Congress's aims

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[14] Petitioners repeatedly invoke Judge Friendly's observation of the "frightening" consequences of adopting a negligence standard under Section 10(b) and Rule 10b-5, and suggest the same concerns arise in these "analogous circumstances." See Pet. 4, 19 (quoting *Texas Gulf*, 401 F.2d at 866-867 (Friendly, J., concurring)). This point has already been refuted by—Judge Friendly himself: While "[i]mposition of too liberal a standard with respect to culpability" would deter "statements issued by corporations[] without legal obligation to do so," "*[s]uch considerations do not apply*" to "proxy statement[s] *required by the Proxy Rules*." On the contrary, "a broad standard of culpability here will serve to reinforce the high duty of care owed by a controlling corporation to minority shareholders in the preparation of a proxy statement seeking their acquiescence in this sort of transaction * * *." *Gerstle*, 478 F.2d at 1300 (Friendly, J.) (emphasis added) (drawing an explicit contrast to Rule 10b-5 and *Texas Gulf*).

are not frustrated by ensuring that mandatory disclosures are in fact *disclosed*. Moreover, courts have been enforcing private actions under Section 14(e) for decades, and Congress, if anything, has endorsed the practice as a useful regulatory tool.

A negligence standard properly holds corporate actors responsible for failing to deliver the facts essential for informed shareholder decision-making. Petitioners may nevertheless insist the sky is about to fall, but their contrary arguments are wrong, waived, or both. This Court's intervention is unwarranted.

1. Petitioners assert that the Ninth Circuit's decision will spark "abus[ive]" securities litigation. Pet. 22-24. This grave prediction is overblown. The elements of securities claims (especially materiality) are notoriously difficult to prove. Plaintiffs must cross multiple thresholds to survive a motion to dismiss, including the PSLRA's other heightened-pleading requirements. 15 U.S.C. 78u-4(b)(1)(A)-(B). That Section 14(e)'s first clause does not require scienter does not mean weak claims get a free pass.[15]

For similar reasons, petitioners are simply wrong that the decision below will act as a "magnet" drawing all securities cases to the Ninth Circuit. Pet. 3, 23. Venue decisions are motivated by a multitude of considerations. It is the rare case where a plaintiff feels he can satisfy everything *except* scienter and sues in an unnatural location for that reason alone. And if petitioners' worry is well-

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[15] Petitioners argue the Ninth Circuit's decision is at odds with the PSLRA's objectives. Pet. 24-25. But Congress could have required scienter across the board; it instead recognized that not every securities claim warrants scienter, and required a "strong inference" only for those that do. 15 U.S.C. 78u-4(b)(2)(A). Petitioners cannot substitute Congress's scalpel with a sledgehammer.

founded, this Court will have plenty of future opportunities to revisit the question. But there is no reason to grant review based on a hypothetical spike that does not actually exist.[16]

Petitioners hint that the Ninth Circuit's law is to blame for the percentage of securities cases filed in that circuit. Pet. 23 ("In 2017, for example, plaintiffs' lawyers filed more than one-fifth of all merger-related class actions in the Ninth Circuit."). What petitioners ignore is that (due to its size) approximately the same percentage of *all* cases are filed in that circuit. See, *e.g.*, U.S. Courts, *Federal Judicial Caseload Statistics 2018*, tbl. C-1 <https://tinyurl.com/2017-dct-stats> (49,669 of 292,076 civil actions). The Ninth Circuit covers nine of the fifty States (approximately 20%), and hears its fair share of cases across all subjects. It is geography, not lenient standards, that drives its docket.

Moreover, this is an odd vehicle for petitioners to complain about forum-shopping: respondents filed suit in California against *a California business* engaged in misconduct *in California*. See, *e.g.*, C.A. E.R. 74 (Schedule 14D-9 statement submitted by Emulex's CEO from "Costa Mesa, California"). Petitioners are thus correct that venue here was not by "happenstance." Pet. 23. It was the most natural and obvious location for the suit.

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[16] Petitioners argue that the "vast majority" of securities suits are dismissed, and predict that will change if suits can survive based on "a plausible allegation of negligence." Pet. 25 (citing statistics). Yet petitioners' statistics are meaningless unless *such suits were dismissed based on failure to allege scienter*. In lodging their broad claims, petitioners make no effort to parse out suits dismissed based on settlements or other relief; and they make no effort to separate suits that fail on the merits due to other deficiencies. The change in standard from scienter to negligence will not affect the outcome in any such litigation, and petitioners are wrong to baldly presume otherwise.

2. Petitioners also ignore the profound benefits produced by legitimate shareholder lawsuits. Congress demanded that companies disclose material facts in the tender context. Yet the desire to consummate a merger can encourage selective disclosure, and there are documented incentives for investment banks to whitewash fairness opinions. L. Bebchuk, et al., *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 Duke L.J. 27, 30 (Feb. 1989). The SEC lacks the resources to monitor each recommendation statement in real-time. *E.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964). Section 14(e), by design, keeps the process honest. See, *e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (recognizing the role of "meritorious private actions" in enforcing securities laws and supplementing USDOJ and SEC efforts).

This very case illustrates the point. Here, Emulex refused to provide relevant information (Goldman Sachs's premium analysis) on a marginal tender offer. The proposal was an obvious close call, with barely 60% of outstanding shares ultimately tendered. C.A. E.R. 194. Reasonable investors would surely be interested to know that Goldman Sachs identified comparable transactions and found that this offer fell in the bottom end. C.A. E.R. 96-97, 261 (44.8% (mean) and 50.8% (median) versus 26.4% (Emulex)); see *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 30-31 (2011).

While this does not automatically establish the transaction was unfair, Section 14's entire point is letting the market decide fairness for itself. *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448 (1976). Petitioners deprived shareholders of key information that Goldman Sachs found sufficiently important to include in its own analysis. (Goldman Sachs does not often waste a board's time with irrelevant material.) That information cut

against the offer's fairness, and shareholders were entitled to the information under Section 14(e). It is unclear why a scienter standard should excuse petitioners' mistake.[17]

3. Petitioners obliquely suggest the Court should grant review on a question the Ninth Circuit did *not* decide: whether Section 14(e) provides a "private right of action at all." Pet. 3, 20. This is meritless. First and foremost, that splitless question was not resolved below because it was not *raised* below. On the contrary, petitioners expressly conceded the point: "defendants do not dispute that *Section 14(e)* provides for a private right of action." Emulex C.A. Br. 47; see also Avago C.A. Br. 4 ("join[ing] and incorporat[ing] by reference" Emulex's brief). Petitioners accordingly did not even attempt to preserve the issue below (not even in a footnote), but explicitly conceded the question. Petitioners are bound by that waiver, and it is too late now to revisit their tactical decision.

In any event, petitioners' argument on this score is insubstantial. According to petitioners and the U.S. Chamber, "Section 14(e) contains no private right, not even a hint of one." U.S. Chamber Br. 3; Pet. 20. Yet Section 14(e) contains exactly the same "hints" that have supported private rights under related securities laws for

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[17] SIFMA's amicus brief is effectively a broadside against private securities litigation generally. See, *e.g.*, SIFMA Br. 7-13. Some organizations may not like the securities laws, but the question here is how best to read the text, purpose, and history of Section 14(e) to determine its proper elements; the answer is not to abandon all traditional tools of statutory interpretation to adopt whatever construction happens to minimize securities claims. And if SIFMA believes the securities laws are too prone to abuse, its proper audience is Congress, not the courts. The political branches have proven perfectly capable of adopting new rules to police abusive securities practices. If policymakers believe the tender context is ripe for new regulation, Congress is well-equipped to solve the problem.

decades. *E.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975) (Section 10(b) and Rule 10b-5); *Borak*, 377 U.S. at 430-431 (Section 14(a)). And Congress has repeatedly revamped core features of securities litigation without once suggesting that these private rights should not exist. See, *e.g.*, Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227; Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. Since its enactment, courts have repeatedly confirmed that "a private right of action may be inferred from Section 14(e)." *Smallwood*, 489 F.3d at 596 n.20 ("follow[ing] the overwhelming weight of authority" and "reaffirm[ing] the importance of private litigation to the effective enforcement of the securities laws"). This is likely why petitioners admitted below that "Section 14(e) provides for a private right of action." Emulex C.A. Br. 47 (emphasis omitted).[18]

The Supreme Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). If the Court wants to rethink half a century of settled practice, it should at least wait for a vehicle where the question presented was not expressly abandoned below. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (refusing to consider "questions neither raised nor resolved below"); *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992) ("[p]rudence" dictates "awaiting * * * the benefit of * * * lower court opinions squarely addressing the question"); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (absent

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[18] Congress's inaction is all the more telling in light of this Court's implicit recognition that Section 14(e) provides a private right of action. See, *e.g.*, *Schreiber*, 472 U.S. at 2 (reviewing and deciding the elements of *Section 14(e)'s private right of action*).

"exceptional" circumstances, this Court does not grant review on "questions not pressed or passed upon below").[19]

4. Finally, this case arises in an interlocutory posture, a sufficient reason alone for denying the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (the lack of a final judgment "alone furnishe[s] sufficient ground" for denying certiorari); see also, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction").

"[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree" (*Hamilton-Brown Shoe*, 240 U.S. at 258), and there is nothing at all "extraordinary" here. This case reaches the Court from a motion to dismiss. The Ninth Circuit decided a single issue related to one challenge to a single element of respondents' claims, and remanded for the district court to reconsider the remainder of petitioners' motion. If petitioners later wish to present the same question, they can do so again, if necessary, upon final judgment. That slight inconvenience for the individual parties in this single case does not warrant abandoning the Court's traditional and sound practice of refusing to hear interlocutory appeals in all but the most unusual and compelling circumstances. See, *e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282-285 (10th ed. 2013).

And adhering to that practice is particularly sound here, where additional proceedings will allow additional time for the issue to percolate among the lower courts. If

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[19] Indeed, if petitioners and their amici genuinely believe this is an important question, it is all the more reason to deny review entirely. There is no reason for the Court to consume its limited bandwidth deciding the proper elements of a right of action that petitioners (wrongly) believe does not exist.

respondents ultimately prevail on the merits and other circuits reject the Ninth Circuit's position after squarely addressing the question in a meaningful way, review in this Court might then be appropriate. But it is plainly premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JUAN E. MONTEVERDE
MILES D. SCHREINER
MONTEVERDE & ASSOCIATES PC
The Empire State Building
350 Fifth Ave., Ste. 4405
New York, NY 10118

BENJAMIN HEIKALI
FARUQI & FARUQI LLP
10866 Wilshire Blvd., Ste. 1470
Los Angeles, CA 90024

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

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